

September 13, 2019

Hon. Jerrold Nadler
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Hon. Lindsey Graham
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20515

Dear Hon. Committee Chairmen:

According to recent news reports, the Department of Justice (“DOJ”) is nearing a final decision on whether to indict former FBI Deputy Director Andrew McCabe on false statement charges.¹ We are deeply troubled by this news and its certain chilling effect on career civil servants. While the Office of Inspector General (“OIG”) found fault with McCabe’s conduct relating to media disclosures he authorized in 2016²—conduct which we neither judge nor excuse—we are concerned, based on publicly available information, about the potential that DOJ’s prosecution of McCabe is politically motivated. President Trump has waged a long-term series of public attacks against this 21-year FBI veteran that have already resulted in his questionably timed firing and now may result in criminal charges that would be highly unusual for the DOJ.³ Because even the prospect of a retaliatory prosecution led by the President is profoundly chilling to civil servants in the performance of their constitutional duties, we urge Congress to immediately investigate what role, if any, the President’s pressure campaign has had on the handling of the McCabe investigation.

President Trump’s animus toward McCabe and the reasons behind it have been widely reported on. During his tenure as FBI Deputy Director, McCabe oversaw the investigation into Russian interference in the 2016 election and was among the first FBI officials to question

¹ Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html>.

² Office of Inspector General, U.S. Department of Justice, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe* (Feb. 2018).

³ See Goldman, *supra* note 1 (noting that prosecutions of federal employees for making false statements during the course of an internal investigation are “extremely rare”).

whether President Trump had improper ties with Russia.⁴ This fact was not lost on President Trump, who responded by launching a public crusade against McCabe that started during his campaign and has continued unabated.⁵ He has accused McCabe of political bias, of participating in an FBI “witch hunt” against Trump, and of being a “sleazebag” and a “bad guy.”

The President’s targeted attacks already have brought serious consequences for McCabe. Earlier this year, President Trump used his Twitter account, speeches, and television appearances to call for McCabe to be fired in advance of his retirement. DOJ fired McCabe on March 16, 2018, just over a day before he became eligible to retire with a full pension. President Trump then called for McCabe to be criminally investigated as part of a “Deep State” conspiracy and FBI coup against Trump. As recently as July 27, in the midst of DOJ’s deliberations on McCabe’s case, President Trump tweeted: “Why didn’t Robert Mueller & his band of 18 Angry Democrats spend any time investigating Crooked Hillary Clinton, Lyin’ & Leakin’ James Comey, Lisa Page and her Psycho lover, Peter S, Andy McCabe, the beautiful Ohr family, Fusion GPS, and many more, including HIMSELF& Andrew W?”⁶ A decision on an indictment now appears imminent.

The DOJ’s notable deviation from the norm in its handling of McCabe’s case is deeply concerning against the backdrop of the President’s verbal crusade. While termination may be a reasonable disciplinary measure for lack of candor in an internal investigation, here, the FBI took the extraordinary action of expediting its firing of a career civil servant to deprive him of retirement funds. Criminal charges are even further out of line with the DOJ’s past treatment of similar conduct by other civil servants,⁷ especially top FBI officials.⁸ To illustrate the extremity of a potential indictment, one legal expert pulled the following examples of the “countless public cases of gross misconduct and lies about that misconduct that are routinely declined as criminal matters” from recent OIG investigations.⁹

- Findings of Misconduct by a United States Marshal for Making an Inappropriate Comment about Shooting a Judge and for Lack of Candor

⁴ See Complaint ¶ 3, *McCabe v. Barr*, No. 19-cv-2399 (D.D.C. Aug. 8, 2019), ECF No. 1, available at <https://int.nyt.com/data/documenthelper/1618-andrew-mccabe-s-civil-lawsuit/3be1ef9625dfdece717f/optimized/full.pdf#page=1>.

⁵ See *id.* ¶¶ 47–104; Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), <https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe> (identifying a series of President Trump’s attacks on McCabe).

⁶ See *id.*

⁷ See *id.*

⁸ Adam Goldman, Katie Benner, and Matt Apuzzo, *FBI Investigated Sessions for Possible Perjury Over Russia Denials*, N.Y. Times (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/us/politics/sessions-fbi-investigation-perjury.html>.

⁹ Wittes, *supra* note 5 (including links to the source OIG documents).

- Findings of Misconduct by a DEA Assistant Special Agent in Charge for Failure to Act in a Professional Manner, and by a DEA Special Agent in Charge for Favoritism and Providing False Statements to the OIG Concerning the Allegations Involving the ASAC
- Findings of Misconduct by a Senior DOJ Official for Ethical Misconduct, Sexual Harassment, Sexual Assault, and Lack of Candor to the OIG
- Findings of Misconduct by an FBI Official for Accepting Gifts from Members of the Media and for Lack of Candor
- Findings of Misconduct by an FBI Special Agent for Receiving Gifts from a Former FBI Confidential Human Source, Using the Source After Deactivation, Protecting the Source and the Source's Illegal Business, Misusing FBI Assets for Personal Gain, Lack of Candor, and Computer Security Policy Violations
- Findings of Misconduct by an FBI Special Agent for Contacting Witnesses for an Improper Purpose, Divulging Law Enforcement Sensitive Information to Unauthorized Individuals, Providing Misleading Testimony, Providing False Information to the OIG, Mishandling Classified Information, and Misusing Government Devices and his Position
- Findings Concerning Misconduct by a U.S. Attorney for Having an Inappropriate Relationship with a Subordinate, Attempting to Influence or Impede an OIG Investigation, and Other Misconduct
- Findings of Misconduct by an FBI Assistant Special Agent in Charge for Submitting False Travel Vouchers, Lacking Candor, and Other Misconduct in Connection with His Relocation
- Findings of Misconduct by an AUSA for Improperly Receiving, Viewing, Copying, and Sharing Personally Identifiable Information of Coworkers, and Lacking Candor with Supervisors
- Findings of Misconduct by an FBI Unit Chief, Including Acceptance of Gifts from Vendors, Giving Preferential Treatment, and Misuse of Position
- Findings Concerning a DOJ Attorney Who Sent Harassing E-mails to Government Employees and Lacked Candor with the OIG¹⁰

Further suggesting a concerning anomaly here, two of the lead prosecutors assigned to McCabe's case reportedly left the DOJ in the middle of the investigation.¹¹

Taken together, President Trump's calls for McCabe to be punished and the extraordinary nature of the criminal investigation leave federal workers, and the general public, with a valid question—has President Trump's pressure influenced the DOJ's decision-making process in violation of the longstanding norm of DOJ independence, the Trump administration's own

¹⁰ *Id.*

¹¹ See Goldman, *supra* note 1.

policies, and the President's oath of office?¹² One need not defend McCabe's conduct, with which the OIG found fault, to be deeply troubled by his potential indictment.

The independent civil service is one of our government's most important institutions. Federal employees take an oath to uphold the Constitution and federal laws that requires them to act based on their loyalty to the law, and not to any person, including the President. Their freedom to uphold the rule of law regardless of who is in charge of the executive branch is a key feature of our democracy. This President has already signaled that civil servants will suffer retaliation for disloyalty to him and his administration.¹³ A politically motivated prosecution of a career civil servant would effect a dangerous additional chill. We therefore urge Congress to investigate President Trump's involvement in the DOJ's handling of McCabe's case in order to reassure federal workers and the American people that issues of employee discipline and law enforcement are resolved based on law and facts in an evenhanded manner and are not politically motivated.

Sincerely,



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Executive Director
Protect Democracy

Kristy Parker
Counsel
Protect Democracy

Steve Lenkart
Executive Director
National Federation of Federal Employees

James Hart
President
Metal Trades Department
AFL-CIO

¹² See *Protecting Independent Law Enforcement*, <https://protectdemocracy.org/protecting-independent-law-enforcement/> (last visited Aug. 29, 2019); Mem. from Donald F. McGahn II, Counsel to the President, re: Communications Restrictions with Personnel at the Department of Justice (Jan. 27, 2017), *available at* <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>.

¹³ See, e.g., Landon Y.R. Storrs, *The Ugly History Behind Trump's Attacks on Civil Servants*, Politico (Mar. 26, 2017), <https://www.politico.com/magazine/story/2017/03/history-trump-attacks-civil-service-federal-workers-mccarthy-214951>.